

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT  
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE  
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

**FILED BY CLERK**

**SEP 10 2008**

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

MARCELLA P.,

Appellant,

v.

ARIZONA DEPARTMENT OF  
ECONOMIC SECURITY, MARINA P.,  
JASMINE P., ALICIA I., and ADRIAN I.,

Appellees.

2 CA-JV 2008-0042  
DEPARTMENT A

MEMORANDUM DECISION

Not for Publication  
Rule 28, Rules of Civil  
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. JD200500172

Honorable Gilberto V. Figueroa, Judge  
Honorable Joseph R. Georgini, Judge

AFFIRMED

Harriette P. Levitt

Tucson  
Attorney for Appellant

Terry Goddard, Arizona Attorney General  
By Pennie J. Wamboldt

Tucson  
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Department of Economic Security

Richard Scherb

Florence  
Attorney for Appellees Marina P.,  
Jasmine P., Alicia I., and Adrian I.

H O W A R D, Presiding Judge.

¶1 In May 2008, the juvenile court terminated the parental rights of appellant Marcella P. to four of her six children after Marcella failed to appear for the severance hearing. The grounds for severing Marcella's rights were: abandonment, A.R.S. § 8-533(B)(1); history of chronic abuse of drugs or alcohol, § 8-533(B)(3); and both nine- and fifteen-month out-of-home placement, § 8-533(B)(8)(a) and (b). On appeal, Marcella contends that she was not given sufficient notice of her right to a jury trial and we must therefore vacate the court's order. For the reasons stated below, we affirm.

¶2 The question of whether Marcella had a right to a jury trial under the circumstances requires us to interpret and apply procedural rules and statutes. It is therefore a legal question, which we review de novo. *See Chartone, Inc. v. Bernini*, 207 Ariz. 162, ¶ 14, 83 P.3d 1103, 1108 (App. 2004). But to the extent there are questions of fact that relate to Marcella's waiver of her rights, including whether she had been served with notice and advised of her rights, we defer to the juvenile court's findings of fact that are either express or implicit in the court's ruling. *See Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 555, 944 P.2d 68, 70 (App. 1997) (reviewing court accepts juvenile court's findings of fact unless no reasonable evidence supports those findings; reviewing court will affirm severance order unless it is clearly erroneous); *see also Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 20, 995 P.2d 682, 686 (2000).

¶3 Marcella did not appear on March 14, 2008, for the hearing on the motion to terminate her parental rights filed by the Arizona Department of Economic Security (ADES). The juvenile court found she had attended the previous hearing, had been told she must appear for the termination hearing, and had signed "the forms knowing what would happen

if she failed to appear.” The court concluded she had voluntarily “absented herself” from the severance hearing. Marcella’s attorney told the court that Marcella was in New Mexico and requested a continuance of the severance hearing, which the court denied. After ADES presented exhibits and testimony, the court found the grounds alleged in ADES’s motion had been proved and that termination of Marcella’s rights was in the children’s best interests. The only argument Marcella raises on appeal is that she had the right to a jury trial on ADES’s motion to terminate her parental rights and that the court failed to advise her of that right.

¶4 Section 8-223, A.R.S., previously provided parents with the right to a jury trial in actions to terminate their parental rights. *See* 2003 Ariz. Sess. Laws 2d Spec. Sess., ch. 6, § 3. But the statute included a delayed repeal clause, pursuant to which the provision would only remain in effect until December 31, 2006. 2003 Ariz. Sess. Laws 2d Spec. Sess., ch. 6, § 45. ADES filed two memoranda in this case, one on November 2, 2006, and the other on March 26, 2007, in which it argued Marcella was not entitled to a jury trial because the termination hearing was to take place after January 1, 2007. Marcella did not respond to the memoranda, and the juvenile court did not discuss or directly rule on the question. Marcella asserts in her opening brief that “it may be inferred that the court agreed with [ADES] by not making the possibility of a jury trial available to Appellant.” Relying on *Arizona Department of Economic Security v. Reinstein*, 214 Ariz. 209, 150 P.3d 782 (App. 2007), Marcella contends the court was wrong.

¶5 In *Reinstein*, Division One of this court held that parents against whom a severance petition or motion was filed before January 1, 2007, accrued the right to a jury trial

when the motion or petition was filed. *Id.* ¶ 16. The right vested when the parents in that case elected to proceed before a jury, which was also before the statute was automatically repealed. *Id.* The court concluded the parents had not lost that accrued and vested right simply because the hearing was to be held after January 1, 2007. *Id.* ¶¶ 16, 18. To the extent we understand Marcella's argument, it is that her attorney did not advise her she had the right to a jury trial and, because it is not clear whether there exists in Arizona the right to assert a claim of ineffective assistance of counsel in these circumstances, *see John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, ¶ 17, 173 P.3d 1021, 1026 (App. 2007), the juvenile court was required to advise her of her right to a jury and failed to do so.

¶6 ADES filed its motion to terminate Marcella's parental rights in November 2006, and Marcella was served both personally and by publication with notice of the initial termination hearing. The notice included admonishments that her failure to appear could be deemed a waiver of her rights, including the right to request a jury trial, if that right existed. Marcella also was served with a copy of ADES's first memorandum regarding its position that she did not have the right to a jury trial. But, as ADES correctly points out, Marcella did not request a jury trial. ADES subsequently filed an amended motion to terminate Marcella's parental rights and again served her with a notice of the initial termination hearing. Again the notice warned her that failure to appear at the hearing could be regarded as a waiver of her right to request a jury trial, if that right existed. ADES filed its second memorandum regarding the jury trial issue, and again Marcella neither responded nor requested a jury trial. The termination hearing was finally held on March 14, 2008.

¶7 Assuming for purposes of this appeal that we agree with the court’s decision in *Reinstein*, we nevertheless conclude Marcella is not entitled to relief. As ADES points out, Marcella was represented by counsel throughout the dependency proceeding, and nothing in the record establishes she or counsel ever requested a jury trial. Pursuant to Rule 66.1(B), Ariz. R. P. Juv. Ct., as it existed before the right to a jury trial was repealed, it was the obligation of Marcella or her counsel to request a jury trial in writing and serve ADES with that request. *See* 214 Ariz. XLIX (order amending rules to reflect elimination of right to jury trial). Consequently, although Marcella’s right to a jury trial may have accrued, she never asserted it; thus, it had not vested before the statute was automatically repealed. *See Reinstein*, 214 Ariz. 209, ¶ 16, 150 P.3d at 786-87. Additionally, even assuming *arguendo* Marcella nevertheless had the right to a jury trial, she forfeited that right by failing to appear at the initial severance hearing after having received notices warning her of that consequence.

¶8 Marcella cites no support for the proposition—nor are we aware of any—that, despite the fact that she failed to appear, the court’s order must be vacated simply because nothing in the record shows the juvenile court had told her she had the right to a jury trial. ADES concedes the former version of Rule 52(C)(4)(e), Ariz. R. P. Juv. Ct.,<sup>1</sup> required the court to provide Marcella with a notice at the initial dependency hearing that she had a right to request a jury trial in a proceeding to terminate her parental rights. We have not been provided a transcript of the initial dependency hearing and therefore assume missing portions

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<sup>1</sup>The rule required the juvenile court to advise the parent he or she had “[t]he right to request trial to a jury in a proceeding to terminate parental rights.” Ariz. R. P. Juv. Ct. 52(C)(4)(e), 214 Ariz. XLVI.

of the record would support the court's order terminating Marcella's rights. *See State v. Printz*, 125 Ariz. 300, 304, 609 P.2d 570, 574 (1980).

¶9 In any event, even assuming the juvenile court did not advise Marcella of the right to a jury trial at the initial dependency hearing, the error was waived by her failure to object or raise this issue at the hearing or any time thereafter, including at the initial severance hearing. Even if preserved, any theoretical error was harmless, given that Marcella had notice by other means that she might arguably have a right to a jury trial: She knew ADES was disputing whether she had such a right and also knew that if she failed to appear, she would forfeit whatever rights she did have. We acknowledge that, in *Manuel M. v. Arizona Department of Economic Security*, 218 Ariz. 205, ¶ 20, 181 P.3d 1126, 1132 (App. 2008), we stated that “a parent’s nonappearance cannot constitute a constructive waiver of any rights that the parent has not been specifically informed he or she could lose by failing to appear.” Here, however, as we have stated, the record shows Marcella was given notice that she would forfeit any right she did have to a jury trial if she failed to appear. And ADES’s memoranda put her on notice that the question whether she did have such a right was being debated and that it was not a settled issue.

¶10 To the extent Marcella is attempting to assert a claim of ineffective assistance of counsel, she failed to “meaningfully develop” this argument in her opening brief. *Id.* n.8. We need not address her intimations that counsel was ineffective in failing to inform her that she had the right to a jury trial or failing to assert that right. *Id.*; *see also* Ariz. R. Civ. App. P. 13(a)(6) (requiring appellant’s opening brief to contain “argument” and “contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to

the authorities, statutes and parts of the record relied on”); Ariz. R. P. Juv. Ct. 106(A) (applying Rule 13, Ariz. R. Civ. App. P., to appeals from final orders in juvenile proceedings). Although Marcella did present some semblance of an argument in her reply brief, it was not sufficiently meaningful; she cites no authorities supporting her conclusory claim that her counsel had been ineffective. Moreover, we do not address arguments made for the first time in a reply brief. *Marco C. v. Sean C.*, 218 Ariz. 216, n.1, 181 P.3d 1137, 1140 n.1 (App. 2008).

¶11 Finally, the right to a jury trial was not the only right Marcella waived when she failed to appear at the initial severance hearing. By failing to appear, Marcella forfeited the right to a contested hearing of any kind; she waived her rights, effectively allowing the court to regard as admitted the allegations in ADES’s motion and terminate her parental rights “based upon the record and evidence presented.” Ariz. R. P. Juv. Ct. 66(D)(2); *see also* A.R.S. § 8-863(C).

¶12 For the reasons stated herein, we affirm the juvenile court’s order terminating Marcella’s rights to her children.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge